

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
CENTRAL DIVISION

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<p>CHAD TWO HEARTS,  Plaintiff/Petitioner,  vs.  UNITED STATES OF AMERICA,  Defendant/Respondent.</p>	<p>3:23-CV-03027-RAL  OPINION AND ORDER GRANTING PETITIONER'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS ON APPEAL</p>
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Petitioner Chad Two Hearts commenced this action challenging his 2013 conviction and sentence for aggravated sexual abuse of a child. Doc. 1; United States v. Two Hearts, 3:12-CR-30108-RAL, Doc. 100. It is not clear to this Court whether Two Hearts is challenging his judgment of conviction under Federal Rule of Civil Procedure 60(b), seeking relief from this Court's February 22, 2017, opinion and order denying his initial § 2255 motion, or seeking relief in a second or successive motion to vacate, set aside or correct his sentence under 28 U.S.C. § 2255. Thus, this Court issued an opinion and order considering each of Two Hearts's potential grounds for relief. Doc. 3. This Court dismissed Two Hearts's Rule 60(b) motion with prejudice and denied his successive or second motion for relief under § 2255 without prejudice to him obtaining an order of authorization from Eighth Circuit Court of Appeals pursuant to 28 U.S.C. § 2244(b)(3). Id. Two Hearts has filed a notice of appeal from this Court's Judgment of Dismissal and Opinion and Order Dismissing Action. Doc. 4. Two Hearts moves for leave to proceed in forma pauperis on appeal. Doc. 7.

## **I. Motion for Leave to Proceed in forma Pauperis on Appeal**

The Eighth Circuit historically has looked to district courts to rule on in forma pauperis motions for appeal and has held that the filing-fee provisions of the PLRA do not apply to habeas corpus actions. Malave v. Hedrick, 271 F.3d 1139, 1140 (8th Cir. 2001) (per curiam). To determine whether a habeas petitioner qualifies for in forma pauperis status, the court need only assess (1) whether the petitioner can afford to pay the full filing fee, and (2) whether the petitioner's appeal is taken in "good faith." 28 U.S.C. § 1915(a)(1), (3).

Two Hearts filed a prisoner trust account report along with his motion for leave to proceed in forma pauperis on appeal. See Doc. 7 at 3. Based on that prisoner trust account report, the Court finds that Two Hearts is indigent and cannot afford to pay the appellate filing fee. Two Hearts's motion for leave to proceed in forma pauperis on appeal, Doc. 7, is granted.

## **II. Certificate of Appealability**

When Two Hearts filed his notice of appeal, he did not file a motion for a certificate of appealability, but he may not appeal the dismissal of a § 2255 motion unless a certificate of appealability issues. Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003). See also 28 U.S.C. § 2253(c)(1)(B) ("Unless a circuit judge or district judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a proceeding under section 2255."). A certificate may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A "substantial showing" demonstrates that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). This Court did not consider the merits of Two Hearts's § 2255 motion because Two Hearts had not

obtained authorization from the Eighth Circuit to file a second or successive petition pursuant to 28 U.S.C. § 2244(b)(3). This Court finds that at this stage Two Hearts has not made a substantial showing that his constitutional rights were denied, so no certificate of appealability will issue. See 28 U.S.C. § 2253(c)(2).

Accordingly, it is

ORDERED that Two Hearts's motion for leave to proceed in forma pauperis on appeal, Doc. 7, is granted. It is further

ORDERED that no certificate of appealability will issue.

DATED this 6<sup>th</sup> day of February, 2024.

BY THE COURT:



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ROBERTO A. LANGE  
CHIEF JUDGE